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No. 09-720

Supreme Court, U.S.
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In The
Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

REPLY BRIEF

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INTRODUCTION

Petitioners' certiorari petition posits a simple question: What is the pre-emptive effect of Congress' *statutory* scheme governing railroad safety?

Without question, pre-emption arises only when it is Congress' "clear and manifest" intent, which is found first in Congress' express statutory provisions. *See Wyeth v. Levine* ___ U.S. ___, 129 S.Ct. 1187, 1194-1195 (2009); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732 (1993). And for railroad safety, Congress has created *one* statutory scheme – Title 49, Subtitle V ("Rail Programs"), Part A ("Safety") – with an *express* declaration of pre-emptive intent for all laws "related to railroad safety." 49 U.S.C. § 20106, subd. (a)(2) (App. 21-22).

Thus, determining Congress' intent for pre-emption of railroad-safety laws would seem to require analysis of Congress' express provision.

But respondent Griffin wants this Court to look for pre-emption everywhere *but* the governing statute. Griffin's opposition brief ("Opp.") *never* addresses Congress' provision, let alone explains how it somehow does not govern all laws "related to railroad safety." Nevertheless, Griffin insists that, in addition to narrow express pre-emption that encourages state participation, there exists simultaneously an implied scheme of universal "field" pre-emption that broadly *bars* all state regulation – pre-emption supposedly to be found:

- In former statutory "acts" (the SAA and BIA) that predated Congress' express pre-emption provision and that no longer exist as discrete "acts," having been largely repealed, with only a few former provisions merged *into* Congress' modern railroad-safety scheme. *See* Opp. at 3-6.

- In "legislative history" that not only does not show congressional intent to pre-empt the "field" but in fact shows a contrary intent to involve the states in regulating railroad safety. *See* Opp. at 7-9.

- In a supposed "avalanche" of case law that, in truth, does not even *address* whether Congress' expression of its pre-emptive intent obviated any earlier interpretation of implied field pre-emption, instead *assuming* that field pre-emption still exists and ruling only on its *scope*. *See* Opp. at 10-13, 17-18.

- And in a recently enacted federal "regulation" that, by definition, does not reflect *Congress'* intent and that lacks any persuasive value. *See* Opp. at 9-10.

None of these trumpeted sources of a broad pre-emptive intent suffices to negate Congress' *express* declaration of a much narrower intent. Thus, broad field pre-emption is not Congress' "clear and manifest" intent.

This Court should grant certiorari.

I. THE SAA AND BIA NO LONGER EXIST, LET ALONE IMPLY A PRE-EMPTIVE INTENT CONTRARY TO CONGRESS' EXPRESS INTENT.

Griffin first asserts that field pre-emption is still implied by the former SAA and BIA, which (according to Griffin) "are now codified" at "49 U.S.C. §§ 20301-20306 and 20701-20[703]." Opp. at 4.

But the acts formerly known as the "SAA" and the "BIA" no longer exist. *See* Petition at 22. In 1994, Congress repealed those former acts' 29 provisions (formerly 45 U.S.C. §§ 1-16 and 22-34), discarded 20, and moved the remaining nine into its comprehensive scheme for railroad "Safety" (now 49 U.S.C. §§ 20301-20306 and 20701-20703). *See* Petition at 22.

Thus, Griffin is wrong to trumpet judicial interpretations of those *former* acts as once impliedly occupying and pre-empting "the field." Opp. at 4-5. Those acts as passed, with their numerous provisions, may once have reasonably been interpreted as occupying the field and thus pre-empting all state regulations. But because those acts' provisions have been decimated, the "acts" themselves no longer exist, and any interpretation of the full former acts no longer applies.

Moreover, even if Congress had kept all the former SAA and BIA provisions, finding that those provisions still implied Congress' intent to apply broad field pre-emption would be improper. Once Congress declared its pre-emptive intent for all laws

"related to railroad safety," gleaning a different "implied" intent became neither necessary nor tenable. *See* Petition at 16-18.

II. THE CITED "AVALANCHE" OF AUTHORITY DOES NOT ADDRESS THE ISSUE PRESENTED HERE.

Next, Griffin claims that an "'avalanche' of authority hold[s] that the BIA and SAA must continue to be given a broad field preemptive effect." Opp. at 10.

But no such "avalanche" exists. Most of Griffin's cited cases do not even *address* the issue presented here: whether Congress' expression of its pre-emptive intent obviated any interpretation that field pre-emption was "implied" in the SAA and BIA. Instead, those cases *assume* that field pre-emption still exists and rule only on its *scope* – *e.g.*, whether it extends to specific regulations or to state tort claims.

Petitioners have cited this Court to the only published decisions they can find that specifically find whether Congress' express provision for narrow pre-emption obviated any implied field pre-emption. *See* Petition at 23-24 (*citing Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983);[1]

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[1] We note that the Ninth Circuit in *Law v. General Motors Corp* , 114 F.3d 908, 913 n 4 (9th Cir 1997), cited *Marshall* (also Ninth Circuit) for the proposition that "the FRSA has no effect on the BIA's preemptive scope." The petition cites only *Marshall*

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Springston v. Consolidated Rail Corp., 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560 (1997); *General Motors Corp. v. Kilgore*, 853 So.2d 171, 179 (Ala. 2002)); Petition at 26 (*citing Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 536 F.Supp. 653 (E.D. Pa. 1982), *summarily aff'd*, 696 F.2d 981 (3d Cir. 1982), *summarily aff'd sub nom. Pennsylvania P.U.C. v. Consolidated Rail Corp.*, 461 U.S. 912 (1983)); Petition at 10-11 (*citing Scheiding v. General Motors Co.*, 993 P.2d 996, 22 Cal.4th 471 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383 (2000); *Carrillo v. ACF Indus., Inc.*, 980 P.2d 386, 20 Cal.4th 1158 (Cal. 1999), *cert. denied*, 528 U.S. 1077, 120 S.Ct. 793 (2000)).

Although Griffin cites numerous other cases applying field pre-emption (Opp. at 10-13), *none* considers the issue raised here, let alone holds that field pre-emption survives despite Congress' express contrary intent.

That is the root of the problem here. For years, most plaintiffs fighting pre-emption of their railroad-safety claims have argued only that "field" pre-emption is not broad enough to bar their claims but not that it simply no longer exists. Thus, defendants have amassed an "avalanche" of authority *imposing* SAA/BIA field pre-emption – but little authority

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(and not *Law*) to show that the nationwide conflict includes the Ninth Circuit *See* Petition at 23

actually holding that such field pre-emption still exists despite Congress' contrary express intent.

III. LEGISLATIVE HISTORY CANNOT OVERCOME CONGRESS' EXPRESS INTENT – AND IT SUPPORTS PETITIONERS.

Next, Griffin contends that "legislative history" shows that Congress, in stating its narrow pre-emptive intent, nevertheless did not "inten[d] to do away with" broad field pre-emption. Opp. at 7.

But Griffin is wrong. When Congress has stated its pre-emptive intent *expressly* in the governing statutory scheme, a contrary intent cannot be "implied" in legislative history or anywhere else. *See English,* 496 U.S. at 78-79; *CSX Transportation*, 507 U.S. at 664.

Moreover, the cited legislative history supports petitioners. Griffin cites the House report reprinted at 1970 United States Code Cong. and Admin. News ("U.S.C.C.A.N.") at 4104 ("House Report"). Opp. at 8. But Griffin fails to acknowledge that this House Report is part of the record below (*see* AA 836-862) and is discussed at length in the petition (at pp. 19-21, 27-29). Nor does Griffin address petitioners' showing that the House Report corroborates that Congress, in enacting its comprehensive railroad-safety scheme and pre-emption provision, intended specifically to *involve* the states in regulating railroad safety – a result irreconcilable with continuing to apply broad field pre-emption barring any state regulation.

Instead, Griffin cites a sliver of the House Report that was discussed in the federal district court's decision in *Consolidated Rail*, 536 F.Supp. at 653. Opp. at 8. But Griffin again ignores the petition, which shows that the district court misconstrued the House Report excerpt that it cited and ignored the balance of the Report contradicting its analysis. *See* Petition at 27-30.

In any case, even if the cited excerpt suggested that field pre-emption be retained, at most it would conflict with the balance of the House Report – and it certainly would not establish Congress' "clear and manifest" intent to retain field pre-emption. *Wyeth*, 129 S.Ct. at 1194-1195.

IV. THE CITED REGULATION DOES NOT REFLECT *CONGRESS'* INTENT.

Next, Griffin asserts that field pre-emption must still exist because a recently enacted federal regulation (49 C.F.R. § 232.13) suggests that courts "conside[r]" both express pre-emption *and* field pre-emption "pursuant to" the BIA and SAA.[2] Opp. at 9-10.

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[2] Although Griffin implies that this "pre-emption" regulation was enacted in "1970" (Opp. at 9), it was not. Over the years, 49 C.F.R. section 232.13 has contained various railroad regulations, mostly substantive. *E.g.*, *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643, 656 (E.D. Mich. 2000) (in 2000, section 232.13 mandated an "air brake test" after a train "sits idle"), *Burlington N. R.R. Co. v. State of Minn.*, 882 F.2d 1349, 1351 (8th Cir. 1989) (in 1989, section 232.13 "permit[ted] the use

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According to Griffin, this regulation "completely destroy[s] Petitioners' argument" that field pre-emption no longer exists. Opp. at 5.

Not so. Federal pre-emption "fundamentally is a question of congressional intent" (*English*, 496 U.S. at 78-79), which is found in *Congress'* statutory enactments, not an agency's regulations. Thus, courts do "not defe[r] to an agency's conclusion that state law is pre-empted." *Wyeth*, 129 S.Ct. at 1201. Federal agencies "have no special authority to pronounce on pre-emption absent delegation by Congress." *Id.* At most, an agency's opinion about pre-emption can be given "some weight," depending on the "thoroughness, consistency, and persuasiveness" of the "agency's explanation." *Id.*

Here, nothing indicates that Congress has "delegated" to any railroad-safety agency the "authority to pronounce on pre-emption." And the agency that issued section 232.13 did not "expla[in]" how field pre-emption can still exist despite Congress' express contrary intent. The agency's bare suggestion to "consider" field pre-emption lacks any "thoroughness" or "persuasiveness" – and thus any persuasive weight *See Wyeth*, 129 S.Ct. at 1201.

Moreover, this regulation's persuasive force is diminished further by the timing of its enactment,

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of a telemetry device to monitor brake pipe pressure") Only recently was section 232 13 assigned a regulation addressing pre-emption, effective January 12, 2009.

effective January 12, 2009, just days before the new President took office. Indeed, President Obama, shortly after taking office, issued an executive memorandum ordering review by his agency heads of all "regulations issued within the past 10 years" that purport to "preempt state law" to determine whether pre-emption is "justified." *See* Fed. Reg., Vol. 74, No. 98, at pp. 24693-24694.

In sum, the cited regulation from the eleventh hour of the prior administration, far from "completely destroying" petitioners' showing that Congress intends only one express pre-emption scheme, has neither binding nor persuasive value.

V. GRIFFIN FAILS TO REFUTE THE CONFLICT AMONG THE STATES AND CIRCUITS.

Next, Griffin fails to refute that this case presents a nationwide conflict, pitting the holdings of California, Alabama, and the Sixth and Ninth Circuits that implied field pre-emption still exists against the holdings of Pennsylvania and Washington that field pre-emption was obviated when Congress expressed its pre-emptive intent.[3] *See* Petition at 23-24.

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[3] Although Griffin tries to expand the conflict by claiming that several other courts have "issued opinions directly contrary to Petitioners' arguments here" (Opp at 17-18), those courts

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Griffin's attacks on the validity of the Pennsylvania and Washington cases holding that the only pre-emption is Congress' express pre-emption (Opp. at 18-25) lack merit, as shown below.

A. Pennsylvania: *Norfolk* has not been "impliedly overruled by this Court."

As petitioners showed, Pennsylvania holds (contrary to California *et al.*) that the "clear intent of Congress" is that field pre-emption is no longer "implied":

> The "clear intent of Congress," as "articulated in the [FRSA] of 1970," is "to permit state regulation of railroad safety until preempted," thus "mandat[ing] the conclusion that the federal government has not preempted the entire field." * * * "While the broad language of the [BIA] at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of [the FRSA's express pre-emption provision] no longer permits that reading."

Norfolk and W. Ry. Co. v. Pennsylvania Pub. Util. Comm., 413 A.2d 1037, 1041-1042, 1043 (Pa. 1980); *see* Petition at 24.

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again did not address the issue presented here, instead assuming that field pre-emption still exists and construing its *scope*

Griffin asserts that *Norfolk* supposedly "has been impliedly overruled by this Court" because the federal district court in *Consolidated Rail* "disagreed" with *Norfolk*, and the Third Circuit and this Court then summarily affirmed making the district-court opinion the "law of the land." Opp. at 18-19.

But as petitioners note (Petition at 31 n.6) and Griffin ignores, the district court found pre-emption in two *alternative* ways: express pre-emption *and* continued BIA field pre-emption. Petition at 26-27; *see Consolidated Rail*, 536 F.Supp. at 657. Although the Third Circuit and this Court summarily affirmed the district court's *outcome*, neither Court affirmed the judge's *reasoning* that BIA field pre-emption still exists. The Third Circuit simply "affirmed," not revealing whether it agreed with the finding of express pre-emption or of implied field pre-emption. *Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 696 F.2d 981 (3d Cir. 1982). And this Court then summarily affirmed the Third Circuit, again without any indication of its reasoning. *Pennsylvania P.U.C.*, 103 S.Ct. at 1888; *see* Petition at 31 n.6.

Nevertheless, Griffin insists that this Court's summary affirmance validated the district court's reasoning – and thus "impliedly overruled *Norfolk*." Opp. at 20. Griffin even cites this Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238 (1977), for the proposition that a "[s]ummary affirmance" by this Court somehow validates the lower court's reasoning. But *Mandel* says precisely the opposite:

> Because a summary affirmance is an affirmance of the judgment only, the *rationale* of the affirmance may *not* be gleaned solely from the opinion below. When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the *reasoning* by which it was reached.

Mandel, 97 S.Ct. at 2240 (emphasis added).

Thus, the federal district court's decision in *Consolidated Rail* is not the "law of the land," nor does it somehow "overrule" the Pennsylvania Supreme Court's decision in *Norfolk*.

Finally, Griffin is wrong to assert that this Court should disregard *Norfolk* because that case's "validity" is supposedly "being questioned" in the Pennsylvania courts. Opp. at 20-21. As petitioners noted in their December 23, 2009, letter to this Court, a Pennsylvania appellate court just expressly *rejected* a challenge to *Norfolk*'s validity, following *Norfolk* to reject the defendant's claim of BIA "field" preemption. *See Atwell v. John Crane, Inc.*, ___ A.2d ___, 2009 Pa. Super. 246, 2009 WL 4844374 (Pa. Super. 12/17/09). Although Griffin claims (without support) that a "request for review by the Supreme Court of Pennsylvania is forthcoming" (Opp. at 21), nothing supports Griffin's claim that the Pennsylvania Supreme Court "may well" overrule *Norfolk* (*id.*) – or indeed that that Court will even grant discretionary review of *Atwell*.

Although defendants like Griffin may continue to attack *Norfolk* as being contrary to their supposed "avalanche" of authority, *Norfolk* is the law of Pennsylvania, being followed today by the lower Pennsylvania courts and thus presenting a conflict that warrants this Court's review.

B. Washington: *State v. Chicago* is "not a field preemption case" *because* field pre-emption no longer exists.

Petitioners showed also that the Washington Supreme Court, just after Congress enacted its express pre-emption provision, held that the BIA did not pre-empt a state locomotive regulation:

> We must conclude that, absent promulgation of federal administrative regulations relating to [locomotive] spark arresters, the Boiler Inspection Act [BIA] does not pre-empt the power of individual states to require such devices. This conclusion is supported by section 205 [the express pre-emption provision] of the [FRSA]. . . .

State v. Chicago, Milw., St. Paul and Pac. R.R. Co., 484 P.2d 1146, 1149 (Wash. 1971), *app. dismissed sub nom. Chicago, Milw., St. Paul and Pac. R.R. Co. v. Washington*, 404 U.S. 804, 92 S.Ct. 108 (1971); *see* Petition at 24.

In response, Griffin insists that *State v. Chicago* is "not a BIA/SAA field preemption case" but "an FRSA case" involving "express preemption analysis."

Opp. at 22-23. But that is the point. Because the Washington Supreme Court correctly recognized that BIA "field" pre-emption *no longer exists*, it looked for pre-emption under the only existing source – Congress' express provision.

Norfolk and *State v. Chicago* stand as the law of Pennsylvania and Washington – and thus raise a conflict, supporting review by certiorari.

VI. GRIFFIN FAILS TO REFUTE THAT THIS ISSUE AFFECTS THE RAILROADS AND RAILROAD-INJURY VICTIMS.

Finally, Griffin fails to refute that the continued imposition of broad field pre-emption (contrary to Congress' intent) weakens railroad safety and harms both railroad-injury victims and the railroads. *See* Petition at 25-36.

First, Griffin asserts that applying field pre-emption is not problematic because FELA supposedly "provides ample recourse for railroad *employees*." Opp. at 26 (emphasis added). But this ignores petitioners' showing that (1) FELA provides no "recourse" for injured *non*-employees, and (2) even employees cannot recover if they cannot show railroad negligence. *See* Petition at 35.

Next, Griffin contends that railroad safety is not compromised by immunizing defective-product manufacturers from tort liability because manufacturers can be subject to "civil penalties" for "violat[ing]" the

BIA. Opp. at 28-29. But the possibility of penalties does not eliminate the problem because (1) some defective products (like Griffin's asbestos brakes here) do *not* violate the former BIA, which never addressed asbestos in train parts, and (2) any possible penalties would not help either an injured *victim* (who would not recover) or the railroads (who would incur all liability).

CONCLUSION

For all of the foregoing reasons, Griffin fails to refute petitioners' showing that review by certiorari is warranted. This Court should grant the petition.

Respectfully submitted,

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